STATE OF MAINE

BEFORE THE GRIEVANCE COMMISSION

File No. 87-S-153

BOARD OF OVERSEERS OF THE BAR	
versus	REPORT OF FINDINGS AND CONCLUSIONS OF PANEL D OF THE GRIEVANCE COMMISSION
GERALD S. COPE	

On Tuesday, September 27, 1988, pursuant to due notice, Panel D of the Grievance Commission conducted a hearing pursuant to Maine Bar Rule 7(e)(2) to determine whether grounds existed for the issuance of a reprimand or whether probable cause existed for the filing of an information with respect to the misconduct alleged in the petition filed in this case on June 28, 1988. The Board of Overseers of the Bar was represented by Assistant Bar Counsel Karen G. Kingsley, Esq., and the Respondent, Gerald S. Cope, Esq., appeared personally and represented himself. Bar Counsel presented the testimony of two witnesses, as well as testimony of the Respondent, and all of the witnesses were sworn. The Panel received eleven exhibits.

This case arose from a complaint filed on December 10, 1987. Bar Counsel caused a copy of the complaint to be

transmitted to the Respondent under letter of December 15, 1987, to which the Respondent failed to reply until he filed his answer to the petition on July 19, 1988. Although the panel finds no violation of the Maine Bar Rules on the substantive merits of the complaint, the Panel does find a violation of Maine Bar Rule 2(c) warranting the imposition of a reprimand under the facts and circumstances of this case.

FINDINGS OF FACT

1. Gerald S. Cope (Respondent), of Portland, Maine, was at all times relevant hereto an attorney duly admitted to and engaging in the practice of law within the state of Maine. The Respondent is acknowledged as a capable practitioner in the bankruptcy field with some thirty-three years of experience, who conducts a busy practice representing debtors in bankruptcies and related proceedings.

2. Beginning some time in May of 1984, Respondent undertook the representation of a debtor in a very substantial case involving a number of priority secured creditors, some forty-seven second-tier lien creditors, and numerous unsecured creditors. During the course of the bankruptcy, Respondent and his paraprofessional and support staff spent many hours receiving and responding to communications regarding the bankruptcy proceedings and transmitting requests for information or action to creditors and others participating

in the bankruptcy case. Among these were communications requesting the consent of lien creditors to a sale of the assets of the debtor.

3. One of the creditors of the bankrupt debtor was Shields Meats and Produce, Inc., of Kennebunk, Maine. Shields had a lien on the assets of the debtor by virtue of financing statements placed on record in February of 1985. Like the other lien creditors, Shields was notified by the Respondent on April 11, 1986, that the assets of the debtor were intended to be sold free and clear of all liens and that an Order would be sought from the bankruptcy court authorizing such a sale, with the proceeds of the sale to remain subject to the liens. In the letter from Respondent to the lien creditors, Respondent requested that they give their consent to the sale and advised them that they would eventually be asked to discharge their liens formally.

4. The creditors participating in the bankruptcy were generally represented by counsel, with the apparent sole exception being Shields. Officers and employees of Shields communicated with Respondent and with his paraprofessional and secretarial staff regarding the bankruptcy and the sale of assets in particular. The credit manager of Shields formed the impression that it would be necessary for Shields formally to discharge its lien in order for the sale to go

through, and that after the sale went through the Shields claim would be paid, although it might take some time before that could happen.

5. After consenting to the sale by transmitting a document to the "York County Clerk" purporting to discharge the lien, Shields waited for some period of time for payment, and when payment was not forthoming, its officers and employees began a pattern of regularly telephoning or writing Respondent seeking information as to the status of the bankruptcy and when Shields might be paid.

6. From April 11, 1986, until the date of the hearing conducted by the Panel, Respondent sent no further written communicatins regarding the status of the bankruptcy to Shields. After a time, Respondent himself did not speak directly with Shields employees or officers when they attempted to enquire of him as to the status of the bankruptcy, although his staff did so. An Order was entered by the bankruptcy court on June 10, 1986, authorizing the sale, directing the payment of certain priority liens, and directing that other lien claims not be paid until further proceedings were undertaken. At no time did Respondent transmit a copy of that Order to Shields, although he was aware of the repeated demands for information or advice as to the time of

payment coming from Shields to Respondent's office. Respondent did testify he believed the court would send a copy of its Order to all creditors affected by the Order.

7. Other than engaging counsel to prepare the financing statements that created its lien in February of 1985, Shields did not consult or retain counsel with respect to the bankruptcy or any aspect of it, including the sale of assets or the status of the lien claims against the proceeds thereafter.

8. Frustrated by his inability to obtain satisfactory information, or even any response whatsoever, from the Respondent, or his office, the President of Shields filed a letter of complaint with the Board of Overseers of the Bar on December 10, 1987.

9. Bar Counsel transmitted a copy of the complaint to the Respondent on December 15, 1987, with a cover letter requesting a response not later than January 8, 1988. Bar Counsel's letter was received by the Respondent, but he did not respond in a timely manner. Respondent explained his failure to answer the letter in a timely fashion because of the heavy burdens of his bankruptcy practice, recent staff upheavals and turnover that left his practice in "chaos" and his need to respond first to more important or more pressing

matters, such as matters pending before the courts and requiring his immediate attention to protect the interests of his clients.

10. On January 26, 1988, Bar Counsel advised the Respondent that Respondent's failure to provide a timely response to Bar Counsel's December 15, 1987, letter would be reviewed by the Grievance Commission as a violation of Maine Bar Rule 2(c) at the same time that the Grievance Commission reviewed the merits of the Shields complaint. Respondent testified that he took this letter to mean that he was "in trouble" and that there would be an opportunity later on, during the course of these proceedings, for him to respond not only to the Shields complaint but to his own failure to respond to Bar Counsel's letter of December 15, 1987.

CONCLUSIONS AND DETERMINATION OF THE PANEL

At the hearing, the President of the Shields Company and his credit manager testified at length about their frustrating attempts to obtain information, and most of all payment, through the Respondent. Both acknowledged that they understood that the Respondent did not represent them. They said that they nontheless relied on Respondent to give them information about the status of the case and to instruct them as to how to proceed to have their claim paid in the course of the bankruptcy, and particularly as a result of the sale of assets.

The President of the Shields Company testified that he knew Mr. Cope by reputation and had confidence in his instructions. There was some dispute in the testimony as to precisely what instructions, if any, the Respondent gave to the officers and employees of the Shields Company. But the apparent confusion suffered by them appears to have resulted in large part from their own unwillingness to engage legal counsel with respect to the bankruptcy or to incur the fees that would be necessary to have their interests protected by an attorney. The President of the company testified to the effect that he was sick and tired of having to pay $50.00 every time he contacted his attorney to get the same type of information that, as a matter of simple courtesy, the Respondent could have provided to him directly.

The Panel can understand the frustration experienced by Complainant and its officers and employees, and appreciates their feeling that the Respondent should have answered their inquiries. Obviously the better practice would have been for Respondent to furnish some sort of answer, by telephone or letter, to advise as to the status of the bankruptcy matter, perhaps to send copies of the court's Order or other relevant documents, or at least to advise the Shields Company that Respondent really could not give the Shields Company legal advice or direction but that Shields would have to retain its own attorney.

But while the Panel feels that this is quite clearly the preferred practice, particularly where counsel knows that a party to litigation is unrepresented, the Panel is unable to conclude that Respondent's conduct in this respect violated any obligation of the Respondent under the Maine Bar Rules.

Attorneys have an obligation to avoid misreliance by others on their legal advice or opinions under Maine Bar Rule 3.6(m), and attorneys have obligations under Rule 3.2(f) to avoid misrepresentation or any conduct that could be prejudicial to the administration of justice. These obligations can be difficult to discharge when dealing with adverse parties in multi-party litigation who are not represented by counsel. This would suggest that the prudent attorney would be very careful to advise such parties that the attorney cannot and does not represent their interests, that the attorney can only respond in limited ways to their inquiries, and that such parties would be well served to get proper legal representation to protect their interests. But it would be unwarranted to impose the same duties on an attorney under those circumstances to persons he does not represent as would be the case to his clients.

The repeated failure to respond adequately to requests or demands for information or action from parties not represented by an attorney may be rude or unprofessional in an

ideal sense, but is not a violation of the Maine Bar Rules in the same sense that such a failure to respond would be as to a client.

The Panel concludes that no violation of the Maine Bar Rules has been made out on the merits of this case, and it appears that this could have been made clear to the Commssion without the necessity of a hearing in these proceedings if the Respondent had only lived up to his obligations under Rule 2(c) and cooperated with Bar Counsel's investigation. Respondent's lack of communication with the Shields Company led to a grievance that might otherwise not have been filed. Respondent's lack of an answer to Bar Counsel compounded that mistake and put Bar Counsel, the complainant, the Commission, the other witnesses, and the Respondent himself to the burden of a lengthy hearing that probably never should have been necessary. This was a waste of resources that could have been more productively used.

Respondent's explanation of the circumstances surrounding his failure to respond to Bar Counsel is totally inadequate and unacceptable. Many attorneys within the state of Maine are extremely busy in their practices, and responding to an inquiry from Bar Counsel is undoubtedly an unwelcomed additional burden. But a failure to respond in a timely manner can only be justified under extraordinary circumstances beyond the control of the attorney. Maine Bar Rules 2(c)

("failure without good cause... to respond" is grounds for discipline). The Panel finds no excuse here for Respondent's failure to answer, or even to dictate a simple letter requesting additional time to respond. Such requests are routinely granted. Such a request in this case might have rendered these proceedings completely unnecessary.

In considering the appropriate discipline to impose in this case, the Panel takes into consideration the fact that Respondent has expressed regret and has no record of prior discipline before the Commission. The Panel must also consider the fact that Respondent is a veteran attorney accustomed to handling the pressures of a busy practice, with its many demands from courts and other agencies outside his office. The Panel finds no good cause to explain why the Respondent would provide no answer to Bar Counsel's inquiry, nor even so much as request additional time to respond if overwhelming circumstances prevented his answering promptly. The Commission cannot agree that other matters were "more important." To agree with that would be to diminish the significance of the role of the Maine Supreme Judicial Court and the Grievance Commission, acting on its behalf, in administering the Code of Professional Responsibility. When one considers how minimal the burden of responding would have been, at least to respond adequately to request additional time for a more thorough answer, one cannot say that Respond-

ent's failure in this case can be in any way excused or justified.

The purpose of the Maine Bar Rules is to protect the public interest and the courts, and to do so by administering discipline in a manner that will prevent future misconduct. When the misconduct involves what amounts to a purposeful failure to cooperate with Bar Counsel in the administration of these rules, discipline other than a public discipline would not be sufficient to accomplish these objectives. Consequently this matter should be concluded by the imposition of a reprimand, and the Respondent is hereby reprimanded for his failure without good cause to make any response to Bar Counsel's inquiries regarding the Shields complaint until after a petition had been filed.

DATED the 17th day of October, 1988.

PANEL D OF THE GRIEVANCE COMMISSION

C. R. deRochemont

William F. Hufnagel

Bryan M. Dench

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